

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

75 7532

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Appeal from the United
States District Court
Southern District of
New York

-----x
IN THE MATTER OF

AIRSPUR CORPORATION, i/k/a
AIRSPUR NEW YORK,

Docket No.
75-7532

Bankrupt.
-----x

BRIEF OF APPELLEE BANKERS
TRUST COMPANY AS TRUSTEE

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BRIEF OF APPELLEE BANKERS
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STATEMENT OF ISSUE PRESENTED FOR REVIEW

WHETHER THE BANKRUPTCY COURT
ERRED IN REFUSING TO
DISMISS THE TRUSTEE'S
COUNTERCLAIM FOR LACK OF
JURISDICTION OVER THE
PERSON OF BANKERS TRUST COMPANY

STATEMENT OF THE CASE

This brief is submitted by Appellee Bankers Trust Company as Trustee ("Bankers Trust"). Bankers Trust has submitted separately, together with Appellees Mercantile Commerce Company and Ohio Real Property, Inc., a brief setting forth grounds common to all of them for affirmance of the order of the District Court dated August 6, 1975 and dismissal of the counterclaims asserted against them by the Trustee in Bankruptcy of Airspur Corporation (the "Airspur Trustee").

Bankers Trust submits this supplemental brief to present a further ground for dismissal which is applicable to it because its proof of claim was filed in its capacity as trustee of certain trust funds, the capacity in which it made the loan of \$1,875,000 to Airspur.

Bankers Trust submits that, even if the Bankruptcy Court had summary jurisdiction of the Airspur Trustee's counterclaim, and even if it were not required in the exercise of its discretion to dismiss the Airspur Trustee's counterclaim because of the pendency of the Airspur Trustee's parallel plenary action in the New York State Supreme Court, the counterclaim alleged against Bankers Trust would require dismissal because it is alleged against it in a capacity in which it is not before the Bankruptcy Court.

The District Court (328a n.4) found it unnecessary to reach this question because of its determination in favor of Bankers Trust of the issues discussed in its opinion and because, while briefed and argued in the Bankruptcy Court, this ground had not been addressed--it

capacity, could not be asserted against Bankers Trust as trustee, the capacity in which it had filed its proof of claim and in which it was before the Bankruptcy Court. On December 7, 1972 counsel for the Trustee moved to amend his objection to substitute the name "Bankers Trust Company, as Trustee" for Bankers Trust Company wherever it appeared (289a). The motion was opposed by Bankers Trust (295a) and was granted with the express proviso that the change in designation of capacity was without prejudice to Bankers Trust's position on its motion, and without waiver of any claim of lack of jurisdiction over the person of Bankers Trust Company. The order so recites (298a).

ARGUMENT

I

THE BANKRUPTCY JUDGE ERRED IN REFUSING
TO DISMISS THE AIRSPUR TRUSTEE'S
COUNTERCLAIMS FOR LACK OF
JURISDICTION OF THE PERSON
OF BANKERS TRUST COMPANY

Even if the Bankruptcy Court would otherwise have jurisdiction of the subject matter of the counterclaim, it has no jurisdiction of the person of Bankers Trust for

apparently was never even considered--by the Bankruptcy Court.*

STATEMENT OF RELEVANT FACTS

Bankers Trust moved to dismiss the Trustee's counterclaim on November 20, 1972. One of the points it urged was that the Airspur Trustee's counterclaim, which was directed against Bankers Trust in its corporate

* Significantly, the Airspur Trustee has avoided discussion of this issue in his Brief, asserting (Trustee's Br. p. 26) that it is somehow not properly before the Court because "the Bankruptcy Court did not decide that issue and Bankers did not raise it in its Notice of Appeal to the District Court." That the Bankruptcy Court did not address this issue does not mean it is not an issue properly before this Court in determining the instant appeal; indeed, the contrary is true. The Airspur Trustee's statement that this issue was not raised in Bankers Trust's Notice of Appeal to the District Court is inexplicable. Since a statement of issues is not required in the Notice of Appeal to the District Court, but in the Designation of the Record on Appeal and Statement of Issues, presumably the Airspur Trustee is referring to Bankers Trust's Designation dated September 16, 1974. The issue here argued is set forth explicitly in that Statement as Item No. 2 on page 2. Of course, the issue was thereafter briefed by both Bankers Trust and the Airspur Trustee before the District Court.

CONCLUSION

For the reasons above stated the order of the District Court dated August 6, 1975 should be affirmed in all respects and the Trustee's counterclaims against Mercantile, Ohio, and Bankers Trust should be dismissed.

Respectfully submitted,

New York, New York
December 12, 1975

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